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March 17, 2005

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth St., S.W.  
Washington, D.C. 20554

## **RE: BellSouth Petition for Declaratory Ruling, WC Docket No. 03-251**

Dear Ms. Dortch,

On behalf of Cinergy Communications Co. (“Cinergy”), I urge the Commission to reject BellSouth’s request for declaratory ruling to preempt an order of the Kentucky Public Service Commission (“PSC”) involving Cinergy, for three reasons:

First, the Commission cannot lawfully grant BellSouth’s preemption petition because a federal court has already considered – and rejected – the very same preemption argument that BellSouth now attempts to re-litigate here. The U.S. Constitution does not permit the FCC to ignore or countermand that federal court decision. *See Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993).

Second, the Commission has already held, in a portion of the *Triennial Review Order* that was not addressed by the Court of Appeals, that Sections 201, 202, and 251 of the Act obligate ILECs to offer UNEs and wholesale communications services on a “commingled” basis. The Commission’s ruling is fully consistent with the Kentucky PSC decision requiring BellSouth to offer UNEs (loops) commingled with tariffed wholesale DSL transmission service.

Third, the Commission should refuse to countenance BellSouth’s anti-competitive practice of tying access to DSL transmission to its retail voice service, which improperly interferes with consumers’ “Internet freedoms.”

These points are discussed at greater length below.

In this proceeding, BellSouth asks the Commission for a declaratory ruling that effectively would preempt, *inter alia*, a Kentucky PSC order in an interconnection arbitration

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proceeding involving Cinergy. Cinergy is a CLEC that provides both conventional and IP-enabled telecommunications services, as well as high-speed Internet access services, to residential and business customers in Kentucky, Indiana, Ohio, and Tennessee. In order to provide both voice telephony and broadband Internet access service to its retail consumers, Cinergy purchases unbundled voice-grade loops and UNE combinations, and also seeks to purchase the tariffed wholesale DSL access transmission service – *not* BellSouth’s retail DSL Internet access service – and use that service to provide its own broadband Internet access service to its customers. Consistently, both the Commission’s rules and BellSouth’s own tariffs require the company to offer UNEs together with wholesale communications services on a “commingled” basis – *i.e.*, “the connecting, attaching, or otherwise linking of an unbundled network element . . . to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.” 47 U.S.C. § 51.5; *see also* BellSouth Tariff FCC No. 1, sec. 2.2.3(A).

However, BellSouth refuses to offer Cinergy this commingled combination in Tennessee, and offers it in Kentucky only because the Kentucky PSC required it to do so, in an arbitration order that was affirmed by the U.S. District Court for the Eastern District of Kentucky. *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, 297 F.Supp.2d 946 (E.D. Ky. 2003) (attached as Exhibit A to Cinergy’s comments, WC Docket No. 03-251, filed Jan. 30, 2004), *affirming Petition of Cinergy Communications Co. for Arbitrations of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to USC Section 252*, Case No. 2001-00432 (Ky. PSC, Oct. 15, 2002) (“Ky. PSC Order”) (attached as Exhibit 9 to BellSouth’s petition). BellSouth now asks the Commission to preempt this same Kentucky PSC decision.

1. The Commission must reject BellSouth’s effort to end-run the decision of the U.S. District Court for the Eastern District of Kentucky. BellSouth has already presented to the Court the same preemption argument that it now presents to the FCC – in a case involving precisely the same set of facts and the same two parties (BellSouth and Cinergy) that are now before the FCC in the instant proceeding – and has already lost. This is the very definition of *res judicata*; and the FCC is not free to ignore the U.S. District Court decision. “Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC . . . similarly has no such power. Nor may an administrative agency choose simply to ignore a federal-court judgment.” *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993). Importantly, this precedent is grounded in the Constitutional prerogatives of Article III courts: “Article III courts ‘render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.’” *Id.* (quoting *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113-14 (1948)). At least with respect to the Kentucky decision,

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the Commission is legally obligated to reject BellSouth's attempt to take a second bite at the same apple. <sup>1/</sup>

2. Moreover, the relief sought by BellSouth would contravene BellSouth's "commingling" obligations under Sections 201, 202, and 251 of the Act, as clarified by the Commission in the *Triennial Review Order* (and not addressed by the U.S. Court of Appeals for the D.C. Circuit in reviewing that order, nor by the Commission in its order on remand). The Commission made it clear that ILECs are obligated to offer UNEs and UNE combinations "commingled" with telecommunications services purchased on a wholesale basis, including tariffed special access services. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 579-84 (2003) ("*Triennial Review Order*"), *subsequent history omitted*. That is all Cinergy seeks to do, and all that the Kentucky PSC ordered – to commingle BellSouth's tariffed wholesale telecommunications service (DSL transmission) with UNEs (unbundled voice-grade loops) and UNE combinations. <sup>2/</sup> The Commission specifically found that "a restriction on commingling would constitute an 'unjust and unreasonable practice' under [section] 201 of the Act, as well as an 'undue and unreasonable prejudice or advantage' under section 202 of the Act. Furthermore, . . . restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3)." *Id.*, ¶ 581. Moreover, the fact that the unbundled loop and the DSL service utilize some of the same network facilities is not a reasonable grounds for BellSouth to refuse to commingle; the Commission specifically made it clear that "incumbent LECs shall not deny access to a UNE on the ground that the UNE or UNE combination shares part of the incumbent LEC's network with access services" or "on the grounds that the UNE shares a transmission facility with tariffed access services or other wholesale services." *Id.*, ¶ 580 & n.1786.

3. Finally, BellSouth's practice of "tying" access to its DSL transmission to purchase of its retail voice service is anti-competitive, and runs directly counter to the principle of "Internet freedom" – the right of broadband consumers to "access and use the content,

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<sup>1/</sup> Note that, unlike the *Brand X* case currently pending before the U.S. Supreme Court, this is not a case where a court ignored the FCC's interpretation of the Communications Act because the court felt bound by an earlier court decision issued prior to the FCC's decision. Rather, in this case the U.S. District Court for the Eastern District of Kentucky applied the same law to the same set of facts involving the same parties as those now before the Commission.

<sup>2/</sup> Cinergy is willing to pay the full rate for the unbundled elements plus the full tariffed rate for the DSL transmission service. It does *not* seek to engage in "ratcheting" these two rates together (*Triennial Review Order*, ¶ 582), nor does it claim a reduction to the unbundled loop rate for unbundling of only the "low frequency portion of the loop" rather than the entire loop (*id.*, ¶ 270), both of which the Commission specifically declined to require. Moreover, contrary to BellSouth's mischaracterizations, Cinergy does *not* seek to combine BellSouth's retail DSL Internet access service (an information service) with the unbundled loop; it seeks commingling of only BellSouth's wholesale DSL transmission service (a tariffed telecommunications service that BellSouth is obligated to offer on a common carrier basis). Nor does this case present the question of "impairment" with respect to the DSL service; Cinergy is not seeking to purchase access to BellSouth's DSL transmission as a UNE.

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applications and devices of their own choice.” <sup>3/</sup> The Commission recently took decisive action to enforce this principle by imposing sanctions on a provider of DSL service that interfered with its customers’ ability to obtain access to an alternative supplier of voice service (in that case, a VoIP provider). <sup>4/</sup> Yet BellSouth asks the Commission to endorse its practice of interfering with DSL subscribers’ ability to purchase voice service from an alternative supplier of voice service (a CLEC using UNEs). Far from endorsing this practice, the Commission should emphatically reject BellSouth’s anti-competitive and anti-consumer practice. Leading members of the U.S. Senate have argued that ILECs “should have to sell DSL without requiring a subscription to standard phone service.”. <sup>5/</sup> And as the Kentucky PSC correctly concluded, BellSouth’s “practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers.” *Ky. PSC Order* at 7.

If you have any questions, please contact me.

Respectfully submitted,



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Counsel for Cinergy Communications Co.

cc: Christopher Libertelli  
Matthew Brill  
Jessica Rosenworcel  
Daniel Gonzalez  
Scott Bergmann  
Austin Schlick  
Jeffrey Carlisle  
Thomas Navin

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<sup>3/</sup> *Preserving Internet Freedom: Guiding Principles for the Industry*, Remarks of Chairman Michael K. Powell (Feb. 8, 2004) at 3.

<sup>4/</sup> See *Madison River Communications, LLC, and affiliated companies*, Order and Consent Decree, DA 05-543 (Enf. Bur., Mar. 3, 2005).

<sup>5/</sup> See “Antitrust Senators to Send Telecom Merger Conditions to DOJ,” *Communications Daily*, March 14, 2005, at 1 (quoting Senator Mike DeWine, chairman, and Senator Herbert Kohl (D.-Wis.), ranking minority member, of the Subcommittee on Antitrust, Competition Policy and Consumer Rights).